SAID HASHIM MOHD BASRI A

v.

PP

COURT OF APPEAL, PUTRAJAYA B
ABDUL KADIR SULAIMAN JCA
ARIFIN ZAKARIA JCA
NIK HASHIM JCA
[CIVIL APPEAL NO. S-09-69-95]
15 DECEMBER 2005 C

CRIMINAL PROCEDURE: *Sentence - Stay of execution - Applicant's motion praying for stay of execution of imprisonment sentence pending disposal of appeal in Federal Court - Motion arose out of decision of Court of Appeal in respect of a criminal matter decided by Sessions Court in its original jurisdiction - Whether Federal Court had jurisdiction to hear and determine appeal - Whether issue of stay of execution would not arise - Courts of Judicature Act 1964, s. 87* D

CRIMINAL PROCEDURE: *Jurisdiction of court - Federal Court - Applicant's motion praying for stay of execution of imprisonment sentence pending disposal of appeal in Federal Court - Motion arose out of decision of Court of Appeal in respect of a criminal matter decided by Sessions Court in its original jurisdiction - Whether Federal Court had jurisdiction to hear and determine appeal - Whether issue of stay of execution would not arise - Courts of Judicature Act 1964, s. 87* E F

By a notice of motion in encl. (23a), the applicant prayed for an order that the execution of the 12-month imprisonment sentence that he was currently serving be stayed, pending the disposal by the Federal Court of his notice of appeal against the decision of G this court made on 21 March 2005. That decision dismissed the applicant's application for an order to reinstate the applicant's appeal before the Court of Appeal which had been dismissed on 21 February 2005 due to the non-filing of the petition of appeal. The respondent raised a preliminary objection on the issue of H incompetency of the applicant's appeal to the Federal Court in the first place, in light of the provisions of s. 87 of the Courts of Judicature Act 1964 ('the Act'). In the circumstances, the applicant's motion ought to be dismissed *in limine* as the prayer was for a stay pending the purported appeal to the Federal Court. I

Held (dismissing the applicant's motion in encl. (23a))
Per Abdul Kadir Sulaiman JCA:

[1] On the facts, it could not be disputed that this motion arose out of the decision of the Court of Appeal in respect of a criminal matter decided by the Sessions Court in its original jurisdiction. The involvement of the High Court here was in its appellate jurisdiction. The purported appeal pending before the Federal Court, for which reason this motion for a stay of execution of the sentence was made before this court, must necessarily involve the matter which was decided by the Sessions Court in the exercise of its original jurisdiction. However, in criminal matters, the appellate jurisdiction given by the Act to the Federal Court is only confined to one decided by the High Court in its original jurisdiction. Hence, s. 87 of the Act was of no assistance to the applicant and there were no other provisions in the Act in respect of any criminal matter decided by the Sessions Court in its original jurisdiction which would confer the jurisdiction in the Federal Court to hear and determine any appeal from any decision of the Court of Appeal in its appellate jurisdiction over the matter. Since this motion concerned a stay pending the disposal of the appeal in the Federal Court, and in view of the interpretation of the various provisions of the Act, the issue of a stay of execution pending the disposal of the appropriate appeal by the Federal Court over the decision of the Court of Appeal from the original decision of the Sessions Court would not arise. Hence, the preliminary objection by the respondent ought to be sustained and the application by way of this motion in encl. (23a) ought to be dismissed. (paras 11 & 12)

Bahasa Malaysia *translation of headnotes*

Melalui notis usul di kandungan (23a), pemohon memohon perintah agar hukuman penjara 12 bulan yang sedang dijalaninya ditangguhkan pelaksanaannya, sementara menunggu notis rayuan beliau terhadap keputusan mahkamah ini pada 21 Mac 2005 diputuskan oleh Mahkamah Persekutuan. Keputusan mahkamah ini tersebut menolak permohonan pemohon bagi mendapat perintah untuk menghidupkan semula rayuannya di Mahkamah Rayuan, yang ditolak pada 21 Mac 2005 kerana kegagalan memfail petisyen rayuan. Responden membangkitkan bantahan awal, terutama mengenai isu ketidak-kompetenan rayuan pemohon ke Mahkamah

Persekutuan, dengan mengambil kira peruntukan s. 87 Akta Mahkamah Kehakiman 1964 ('Akta'). Persoalannya adalah sama ada usul pemohon harus ditolak *in limine* kerana permohonannya itu adalah untuk penangguhan sementara menunggu rayuan ke Mahkamah Persekutuan.

Diputuskan (menolak usul pemohon di kandungan 23(a))
Oleh Abdul Kadir Sulaiman HMR:

[1] Berdasarkan fakta, tidak boleh dinafikan bahawa usul ini berbangkit dari keputusan Mahkamah Rayuan berhubung suatu perkara jenayah yang diputuskan oleh Mahkamah Sesyen dalam bidang kuasa asalnya. Penglibatan Mahkamah Tinggi adalah atas bidang kuasa rayuannya. Tidak dapat tidak, rayuan yang menunggu keputusan Mahkamah Persekutuan tersebut, yang menyebabkan usul dibuat untuk menangguh pelaksanaan hukuman di mahkamah ini, akan membabitkan perkara yang diputuskan oleh Mahkamah Sesyen pada melaksanakan bidang kuasa asalnya. Bagaimanapun, dalam perkara jenayah, bidang kuasa rayuan yang diberi oleh Akta kepada Mahkamah Persekutuan adalah terhad kepada perkara yang diputuskan oleh Mahkamah Tinggi dalam bidang kuasa asalnya. Seksyen 87 Akta, dengan itu, tidak membantu pemohon, kerana tidak ada sebarang peruntukan lain di dalam Akta, berhubung mana-mana perkara jenayah yang diputuskan oleh Mahkamah Sesyen dalam bidang kuasa asalnya, yang memberikan bidang kuasa kepada Mahkamah Persekutuan untuk mendengar dan memutuskan apa-apa rayuan terhadap mana-mana keputusan Mahkamah Rayuan atas perkara tersebut dalam bidang kuasa rayuannya. Oleh kerana usul ini adalah mengenai penangguhan sementara menunggu keputusan rayuan di Mahkamah Persekutuan, dan berdasarkan pentafsiran beberapa peruntukan Akta, maka isu penangguhan pelaksanaan sementara menunggu keputusan suatu rayuan yang wajar oleh Mahkamah Persekutuan terhadap keputusan Mahkamah Rayuan yang berbangkit dari keputusan asal Mahkamah Sesyen tidak timbul. Oleh yang demikian, bantahan awal responden harus dipertahankan dan permohonan melalui usul di kandungan (23a) harus ditolak.

Case(s) referred to:

Megat Najmuddin Dato' Seri (Dr) Megat Khas v. Bank Bumiputra (M) Bhd [2002] 1 CLJ 645 FC ***(dist)***

Ming Ann Holdings Sdn Bhd v. Danaharta Urus Sdn Bhd [2002] 3 CLJ 380 CA ***(dist)***

Legislation referred to:
Courts of Judicature Act 1964, ss. 50(1), 87, 96
Penal Code, s. 409

For the appellants - Hamid Ismail; M/s Hamid & Co
For the respondents - Anthony Kevin Morais

Reported by Suresh Nathan

JUDGMENT

Abdul Kadir Sulaiman JCA:

[1] By a notice of motion dated 15 April 2005 in encl. (23a) which is supported by an affidavit of the applicant affirmed on 14 April 2005, the applicant prays for an order that the execution of the 12 months imprisonment which he was currently serving be stayed pending the disposal by the Federal Court of his notice of appeal against the decision of this court made on 21 March 2005. That decision dismissed an application by the applicant by notice of motion of 4 March 2005 which prays for an order to reinstate the appeal before the Court of Appeal which was dismissed on 21 February 2005. The dismissal on 21 February 2005 was for the reason that there was no proper appeal before the court owing to the non-filing of the petition of appeal.

[2] On 9 May 2005 we dismissed the said motion of 15 April 2005 in encl. (23a). We now provide our reasons for so doing. But before that, in order to properly appreciate the reasoning, we would briefly state the events leading to the various applications made by the applicant.

[3] Initially, the applicant was charged in the Sessions Court Tawau, Sabah for criminal breach of trust, an offence punishable under s. 409 of the Penal Code. At the conclusion of the trial he was convicted and sentenced to 18 months imprisonment. Dissatisfied with the said decision, he appealed to the High Court, Tawau, Sabah against the said conviction and sentence. The High Court dismissed his appeal against conviction. However, his appeal against sentence was allowed to the extent that it was reduced from 18 months to 12 months imprisonment. The sentence was however, stayed pending further appeal to the Court of Appeal. The notice of appeal to the Court of Appeal was filed on 3 February 1995.

[4] That appeal before the Court of Appeal was fixed for hearing on 21 February 2005. On that day, Encik Sugumar Balakrishnan, the then counsel for the applicant made an oral application discharging himself as counsel representing the applicant which application was allowed by the court. As to the appeal proper, due to the non-filing of a petition, it was dismissed. The decision of the High Court was accordingly affirmed and the applicant was accordingly ordered to serve his 12 months sentence forthwith.

[5] Then by a notice of motion dated 4 March 2005 in encl. (12a), the applicant through his new counsel, Encik Hamid Ismail, made an application for reinstatement of the appeal process and for stay of execution of the sentence imposed on the applicant pending the disposal of the appeal if the application for reinstatement is allowed. This application was heard on 21 March 2005 by the Court of Appeal and was again dismissed. So, on 1 April 2005 the applicant filed an appeal with the Federal Court against the dismissal of the application by the Court of Appeal. In the meanwhile, the present motion in encl. (23a) was filed.

[6] At the commencement of the hearing of the application on 9 May 2005, the learned deputy for the respondent raised a preliminary objection on the issue of incompetency of the applicant's appeal to the Federal Court in the first place in the light of the provisions of s. 87 of the Courts of Judicature Act 1964. In the circumstances, this motion of the applicant ought to be dismissed in limine as the prayer is for a stay pending the purported appeal to the Federal Court.

[7] In reply, the learned counsel for the applicant merely referred us to two case authorities to counter the argument of the learned deputy. One is *Ming Ann Holdings Sdn. Bhd. v. Danaharta Urus Sdn. Bhd.* [2002] 3 CLJ 380 where at p. 405 Abdul Hamid Mohamad JCA (as he then was) said:

> I do not think that a court hearing an application for a stay of execution should make a finding that the appeal is doomed to failure or even that there are no merits in the appeal. The reasons are given by Shanker J (as he then was in) in *Salim bin Ismail & Ors* at p 3:
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> The grounds of judgment of the trial judge are not before us and it would be premature for us to say that this appeal is without any prospect of success.

[8] The other is *Megat Najmuddin bin Dato Seri (Dr) Megat Khas v. Bank Bumiputra (M) Bhd.* [2002] 1 CLJ 645 where one of the issues to be determined by the Federal Court was whether it has jurisdiction to determine appeals from any judgment, order or decision of the Court of Appeal which did not originate from the High Court, save and except from any judgment, order or decision which is whether the Court of Appeal should or should not grant leave to appeal to it.

[9] It is interesting to note that the two cases cited by the learned counsel are in respect of civil matters but the matter before us is a criminal one. In as far as the jurisdiction of the Federal Court to hear and determine any appeal from a decision of the Court of Appeal in its appellate capacity in respect of any criminal matter is governed by s. 87 of the Act. But in respect of its appellate jurisdiction in respect of any civil cause or matter, it is governed by s. 96 of the Act. Since, we are here dealing with a criminal matter, the issue of s. 96 of the Act would not at all arise. In the circumstances, the two case authorities cited by the learned counsel for the applicant, are of no assistance and therefore, irrelevant. Further, our reason for dismissing the motion is not on a finding that the appeal before the Federal Court is doomed to failure or even that there are no merits in the appeal.

[10] Reverting to s. 87 of the Act which governs criminal matters such as the nature of the motion before us now, subsection (1) thereof states as follows:

> (1) The Federal Court shall have jurisdiction to hear and determine any appeal from any decision of the Court of Appeal in its appellate jurisdiction in respect of any criminal matter **decided by the High Court in its original jurisdiction** subject to any rules regulating the proceedings of the Federal Court in respect of appeals from the Court of Appeal. (emphasis added).

[11] It cannot be disputed that this motion arose out of the decision of the Court of Appeal in respect of a criminal matter decided by the Sessions Court in its original jurisdiction. The involvement of the High Court here was in its appellate jurisdiction. The purported appeal pending before the Federal Court for which reason this motion for a stay of execution of the sentence was made before us must necessarily involve the matter which was decided by the Sessions Court in the exercise of its original jurisdiction. However, in criminal matters, the appellate

jurisdiction given by the Act to the Federal Court is only confined to one decided by the High Court in its original jurisdiction. Hence, s. 87 of the Act is of no assistance to the applicant. We cannot find any other provisions in the Act in respect of any criminal matter decided by the Sessions Court in its original jurisdiction which would confer the jurisdiction in the Federal Court to hear and determine any appeal from any decision of the Court of Appeal in its appellate jurisdiction over the matter. Looking at s. 50(1) of the Act, it only concerns the exercise of the appellate or revisionary jurisdiction in respect of any criminal matter decided by the Sessions Court. But the jurisdiction in s. 50 is given only to the Court of Appeal. Subsection (1) thereof states as follows:

> 50(1) Subject to any rules regulating the proceedings of the Court of Appeal in respect of criminal appeals, the Court of Appeal shall have jurisdiction to hear and determine any appeal against any decision made by the High Court:
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> (a) in the exercise of its original jurisdiction; and
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> (b) in the exercise of its appellate or revisionary jurisdiction **in respect of any criminal matter decided by the Sessions Court.** (emphasis added).

[12] Since this motion in encl. (23a) concerns a stay pending the disposal of the appeal in the Federal Court, and in the view that we take on the interpretation of the various provisions of the Act, the issue of a stay of execution pending the disposal of the appropriate appeal by the Federal Court over the decision of the Court of Appeal made on 21 March 2005 from the original decision of the Sessions Court would not arise. Hence, the preliminary objection by the respondent ought to sustain and therefore, the application by way of this Motion in encl. (23a) ought to be dismissed. We accordingly made the order dismissing the motion so filed.